

Journal of Civil Rights and Economic Development

Volume 21
Issue 2 *Volume 21, Spring 2007, Issue 2*

Article 6

March 2007

Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina

Stephen M. Griffin

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

Recommended Citation

Griffin, Stephen M. (2007) "Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina," *Journal of Civil Rights and Economic Development*: Vol. 21 : Iss. 2 , Article 6.
Available at: <https://scholarship.law.stjohns.edu/jcred/vol21/iss2/6>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

STOP FEDERALISM BEFORE IT KILLS AGAIN: REFLECTIONS ON HURRICANE KATRINA

STEPHEN M. GRIFFIN*

Like ideas, institutions have consequences. Federalism is both. To understand federalism within the context of constitutionalism in the United States, we must look beyond the conventional definition that runs in terms of primary and subordinate sovereignties. From a developmental and institutional perspective, “Our Federalism” is just as much a commitment to localism and the value of the fragmentation of government authority as it is a commitment to maintaining dual national and state governments. And it is just as much a set of values, even an ideology, as it is a system of institutions.

In the aftermath of Hurricane Katrina, President George W. Bush remarked, “It’s a – very important for us to understand the relationship between the federal government, the state government, and the local government when it comes to major catastrophe.”¹ The President was correct in seeing federalism as central to what was largely a government-created disaster. One could wonder, however, how it was that there was not a better understanding about who would do what prior to Katrina’s terrible landfall.

Hurricane Katrina operated like a CT or MRI scan on governance in the United States and the results were not pretty. It is widely agreed that our separated system of federal, state, and local jurisdictions did not work together and did not work

* Rutledge C. Clement, Jr. Professor in Constitutional Law, Tulane Law School. Prepared for St. John’s Conference on Federalism Past, Federalism Future, March 3, 2006. Email: sgriffin@law.tulane.edu.

¹ CNN REPORTS, KATRINA: STATE OF EMERGENCY 128 (Andrews McMeel Publishing 2005).

well. In this short article, I will first survey the harm done by our federal system, then offer some historical perspective on what went wrong, and finally try to analyze what, if anything, we can learn from this experience.

Before I proceed, it is necessary to offer some caveats. First, although I consider the role of the constitutional system in what happened during Hurricane Katrina, I do not address the role of constitutional law. That is, I am not addressing the role of the Supreme Court, but rather the structure of government originally created by the Constitution. Second, I'm not asserting that the Constitution was the sole or even primary cause of the disaster, but a contributing cause. Third, by attributing some blame to federalism, I am not suggesting that our system of government needs to be replaced with a non-federal system. I am rather trying to think about how and to what extent our federal structure could be reformed consistent with the Constitution.

I. AN ANATOMY OF KATRINA'S FEDERAL FAILURES

On Wednesday, August 31, 2005, two days after Hurricane Katrina made landfall on the Gulf Coast, Secretary of Homeland Security Michael Chertoff held a press conference at which he was asked a question about the chain of command and how conflicts among levels of government are worked out during a national disaster. He responded: “[W]e come in to assist local and state authorities. Under the constitution, state and local authorities have the principal first line of response obligation DHS has the coordinating role, or the managing role [T]he president has, of course, the ultimate responsibility for all the federal effort here I want to emphasize the federal government does not supersede the state and local government. We fit . . . in a comprehensive response plan.”²

Secretary Chertoff was reflecting the official policy of the federal government, as embodied in the “National Response Plan,” adopted in late 2004.³ In the plan (a largely technical

² *Id.* at 46.

³ See generally U.S. DEPARTMENT OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN (Dec. 2004), <http://www.dhs.gov/interweb/assetlibrary/NRPbaseplan.pdf>.

document authored by the Department of Homeland Security and meant for the bureaucracy), the emphasis was on having the lowest level of government possible handle disaster response. The plan states under "Planning Assumptions & Considerations": "Incidents are typically managed at the lowest possible geographic, organizational, and jurisdictional level."⁴

One of the most unusual characteristics of Hurricane Katrina was how it blasted away nearly all of the local government infrastructure in New Orleans and on the Mississippi Gulf Coast. It therefore removed the basis on which the National Response Plan was built.⁵ Katrina challenged assumptions going back many decades as to how the federal structure should operate, not just during a crisis, but also in preparing for crisis situations.

In the immediate aftermath of Hurricane Katrina, journalists and the public began asking why the effort to aid the Gulf Coast floundered so badly. A number of news stories, notably by the Newhouse News Service and New York Times, laid part of the blame on a defective system of governance.

The Newhouse News Service story stated that the muddled response to Hurricane Katrina exposed something known by Washington insiders: "For reasons that run deep and probably can't be fixed, Washington has difficulty making long-range plans, coordinating its actions and tackling the tough political decisions required for swift disaster response and other critical responsibilities."⁶ A number of factors were cited: (1) power and authority are fragmented as the framers intended; (2) election cycles mean attention spans are short; (3) bureaucracy stifles

⁴ *Id.* at 6.

⁵ As the White House Report on Hurricane Katrina stated, [a]n important limiting factor of the Federal response, as discussed in the Primer chapter, is that the Federal response is predicated on an incident being handled at the lowest jurisdictional level possible. A base assumption to this approach is that, even in cases where State and local governments are overwhelmed, they would maintain the necessary incident command structure to direct Federal assets to where they are most needed. In the case of Katrina, the local government had been destroyed and the State government was incapacitated, and thus the Federal government had to take on the additional roles of performing incident command and other functions it would normally rely upon the State and local governments to provide.

THE WHITE HOUSE, *THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED* 42 (Feb. 2006), <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> [hereinafter "LESSONS LEARNED"].

⁶ David Wood and Chuck McCutcheon, *Government's Shortcomings Exposed: System Not Tailored to respond Quickly*, NEW ORLEANS TIMES-PICAYUNE, Sept. 19, 2005, at A-5.

initiative; and (4) intense partisan conflict.⁷ “Chief among the federal government’s structure problems is its division of responsibility, said Paul Light, professor of public service at New York University. ‘It’s built into the Constitution that we have a federal system where states and localities have a lot of responsibility,’ he said. ‘Part of this is embedded in the system that we don’t want a strong federal presence The founders were clear in wanting to protect citizens from the national government.’”⁸

An important theme here was that the eighteenth-century federal order persists and has certain effects. In this system, there are separate governments that do not ordinarily share power. If coordinated action is required, everyone has a veto over the outcome of the process before the bargaining starts. Washington Post columnist David Broder wrote of Hurricane Katrina: “The failure to respond to that disaster exposed one of the few real structural weaknesses in our Constitution: a mechanism to coordinate the work of local, state and national governments.”⁹ News reports showed that a week after Katrina made landfall, local, state and federal officials were still arguing over who was in charge.¹⁰

The New York Times also analyzed the breakdown in the government’s response: “As the city [of New Orleans] bec[ame] paralyzed both by water and by lawlessness, so did the response by government. The fractured division of responsibility – Gov. Blanco controlled state agencies and the National Guard, Mayor Nagin directed city workers and Mr. Brown, the head of FEMA, served as the point man for the federal government – meant no one person was in charge. Americans watching on television saw the often-haggard governor, the voluble mayor and the usually upbeat FEMA chief appear at competing daily press briefings and interviews.”¹¹ And: “The power-sharing arrangement was by design, and as the days wore on, it would prove disastrous. Under the Bush administration, FEMA redefined its role,

⁷ See *id.*

⁸ *Id.*

⁹ David S. Broder, *The Right Minds for Recovery*, WASH. POST, Sept. 29, 2005, at A-23.

¹⁰ See Eric Lipton *et al.*, *Breakdowns Marked Path From Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, § 1, at 1.

¹¹ *Id.*

offering assistance but remaining subordinate to state and local governments. 'Our typical role is to work with the state in support of local and state agencies,' said David Passey, a FEMA spokesman."¹²

The consequences of this governmental paralysis were appalling human suffering, the humiliation of the U.S. government in the eyes of the nation and the world,¹³ and delay after delay in the rendering of needed aid. The evacuation of tens of thousands of people from the Louisiana Superdome arena was delayed unnecessarily because the federal and state governments could not communicate effectively about who was supposed to provide transportation.¹⁴ No effective communication meant that officials were unaware that there were thousands of people at the New Orleans Convention Center without food, water, or medicine.¹⁵ The New Orleans police were immediately overwhelmed by the storm¹⁶ and military help from the National Guard and U.S. Army was delayed by the slowness of the original federal response and fights over jurisdiction.¹⁷ As a result, law and order broke down in New Orleans.¹⁸

Part of the problem was that the scale of devastation was vast. During hearings held by the House Select Committee to investigate the federal response, former Federal Emergency Management Agency (FEMA) head Michael Brown stated: "[Hurricane Katrina] was beyond the capacity of the state and local governments, and it was beyond the capacity of FEMA,' . . . 'It was the largest natural disaster ever to strike the United

¹² *Id.*

¹³ See Todd S. Purdum, *Across U.S., Outrage at Response*, N.Y. TIMES, Sept. 3, 2005, at A1; see also CNN REPORTS, *supra* note 1, at 76–77.

¹⁴ See CNN REPORTS, *supra* note 1, at 33.

¹⁵ See *id.* at 66, 70. On September 2, CNN reporter Soledad O'Brien interviewed Dr. Sanjay Gupta of Charity Hospital in New Orleans:

I've seen a lot of situations. I was in Sri Lanka for the tsunami. I was in Iraq for the war. I've seen a lot of different situations, where people have to make shift, make due with what they have. This has been as bad as any of those. I mean, no food, no electricity, no water, and surrounded by this cesspool of potential infectious diseases as well.

Id. at 83.

¹⁶ See Dan Baum, *Deluged: When Katrina Hit, Where Were the Police?*, THE NEW YORKER, Jan. 9, 2006, at 50.

¹⁷ CNN REPORTS, *supra* note 1, at 39.

¹⁸ See generally Baum, *supra* note 16.

States – 92,000 square miles. Logistics were falling apart.”¹⁹ Admiral Timothy Keating, Commander, Northern Command, testified: “During the first four days, no single organization or agency was in charge of providing a coordinated effort for rescue operations.”²⁰ In its report, the Committee concluded: “The catastrophic nature of Katrina confirmed once again that the standard ‘reactive’ nature of federal assistance, while appropriate for most disasters, does not work during disasters of this scale. When local and state governments are functionally overwhelmed or incapacitated, the federal government must be prepared to respond proactively.”²¹

The Committee was referring to what is known as a “pull” system, in which federal authorities wait for state authorities (who are supposed to combine local requests) to request resources in an emergency. This was a fundamental assumption of the National Response Plan.²² Hurricane Katrina posed multiple challenges for this philosophy, ultimately grounded in values of federalism. Because local governments and communications had been wiped out, state authorities did not know what to request. The extent of the crisis meant that state officials were themselves overwhelmed and unable to cope.²³ The Committee noted that a “push” system, in which federal authorities try to anticipate state needs in advance of a storm, is not a new concept, but it has rarely been tried.²⁴

As these sources indicate, most of the worry over federalism expressed in Katrina’s wake had to do with the response to the immediate aftermath. Less noticed was the role of federalism in the levee and communications failures that led to the drowning of New Orleans. The levees that failed so spectacularly in New Orleans were the result of a long-term federal project, the Lake Pontchartrain and Vicinity Hurricane Protection Project begun

¹⁹ U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 320 (February 15, 2006), <http://www.gpoaccess.gov/katrinareport/mainreport.pdf> (footnote omitted) [hereinafter FAILURE OF INITIATIVE].

²⁰ *Id.* at 230 (footnote omitted).

²¹ *Id.* at 132.

²² *See id.* at 15, 30.

²³ *See id.* at 187, 324.

²⁴ *See id.* at 136.

after Hurricane Betsy in 1965.²⁵ This was a joint federal, state, and local effort with shared costs.²⁶ After the U.S. Army Corps of Engineers (USACE) built the levees, they were turned over to local sponsors.²⁷ Different parts of the Pontchartrain project “were turned over to four different local sponsors – to include the Orleans, East Jefferson, Lake Borgne, and Pontchartrain levee districts. In addition, there are separate water and sewer districts that are responsible for maintaining pumping stations.”²⁸ USACE had doubts about this, but fragmentation was what local authorities preferred.²⁹ According to USACE, multiple authorities meant that when different elements of the protection plan came together, “the weakest (or lowest) segment or element controlled the overall performance.”³⁰ Raymond Seed, Professor of Civil and Environmental Engineering at the University of California, Berkeley stated, “No one is in charge. You have got multiple agencies, multiple organizations, some of whom aren’t on speaking terms with each other, sharing responsibilities for public safety.”³¹ This meant that levee boards could oppose measures that could have made the levees safer.³²

According to the House Committee, part of the problem with communications was the failure of state and local authorities to use federal dollars effectively to develop interoperable communications. When the crisis hit, different agencies could not communicate with one another due to different types of systems.³³ This is a general problem in the United States: “A Conference of Mayors 2004 survey of 192 cities showed 44

²⁵ See *id.* at 51. Originally, this project was to be completed in ten years, but at the time of Hurricane Katrina, it was still not complete, due at least in part to budget reductions.

²⁶ See *id.* at 89.

²⁷ See *id.* at 91.

²⁸ *Id.* (footnotes omitted).

²⁹ For a discussion of this topic, see the outstanding article by Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 30–31 (2006).

³⁰ FAILURE OF INITIATIVE, *supra* note 19, at 92.

³¹ *Id.*; see also Ralph Vartabedian & Stephen Braun, *System Failures Seen in Levees: Investigators Looking Into the Breaches in New Orleans Find Problems in Design, Construction and Maintenance of the Flood-control Barriers*, L.A. TIMES, Oct. 22, 2005, at A1.

³² See Michael Grunwald & Susan B. Glasser, *The Slow Drowning of New Orleans*, WASH. POST, Oct. 9, 2005, at A1; Bob Marshall et al., *For Centuries, Canals Kept New Orleans Dry. Most People Never Dreamed They Would Become Mother Nature’s Instrument of Destruction*, NEW ORLEANS TIMES-PICAYUNE, Jan. 29, 2006, at 1.

³³ See Joby Warrick, *Crisis Communications Remain Flawed*, WASH. POST, Dec. 10, 2005, at A6.

percent reported an accident within the preceding year in which the lack of interoperable communications made response difficult; 49 percent of cities are not interoperable with state police; 60 percent are not interoperable with their state emergency operations centers; and 83 percent are not interoperable with the federal law enforcement agencies.”³⁴ But the Committee found that the main problem with achieving interoperability was not lack of funding, but rather agreement and planning across state and local jurisdictions.³⁵

Federalism in terms of local control reared its ugly side soon after the storm passed. To assist evacuees from New Orleans, particularly those who were renters, FEMA wanted to set up large towns of mobile homes in Louisiana parishes out of the disaster zone. To help meet this goal, FEMA ordered thousands of mobile homes.³⁶ But the parishes refused, often citing concerns about the behavior of the (mostly African-American) former residents of New Orleans.³⁷ Racial stereotypes were not far below the surface in these public debates. So the mobile homes sat empty in (ironically) Hope, Arkansas.³⁸

All of these melancholy examples of governmental failure tell us something valuable about the nature of federalism. Federalism is not simply about the sheer fact of the existence of federal and state governments. Federalism is also about localism. Despite being dependent for their legal authority on state governments, local governments have substantial legal and political authority. Federal disaster policy has been based formally on the idea that local governments know local conditions best. Hence, the requirement that the federal government wait patiently as state governments collate local requests in time of disaster.

Consider also the concealed assumption that the federal system must be a certain way because it has always been that

³⁴ FAILURE OF INITIATIVE, *supra* note 19, at 174 (footnote omitted).

³⁵ See *id.* at 175 (testimony of David Boyd, Deputy Director, Office Systems Engineering and Development, DHS).

³⁶ See Eric Lipton, *Trailer Dispute May Mean Thousands Will Go Unused*, N.Y. TIMES, Feb. 14, 2006, at A18.

³⁷ See Rob Nelson, *Uproar Raised Over Trailer Park; Bar N.O. Residents, West Jeff People Say*, NEW ORLEANS TIMES-PICAYUNE, Nov. 30, 2005, at 1; see also FAILURE OF INITIATIVE, *supra* note 19, at 314.

³⁸ See Lipton, *supra* note 36.

way. From this point of view, we may be struggling with the legacy of an eighteenth century constitutional system, but at least it is a system that the founding generation designed and thought was well-justified. Among other effects, this saves officials from having to fully confront their own responsibility for how the system is run.

Finally, consider how these examples suggest that federalism is an instance of the historic American commitment to the near-maximum fragmentation of governmental authority. There was no inherent reason, for example, why levee board boundaries had to coincide with parish boundaries. Levees and floodwalls extend over city and parish boundaries in order to protect flood plains whose limits are determined by the natural environment, not politics. Similarly, there was no justification for allowing local and state authorities to fight for years over who was going to buy which communications system. Indeed, they would not have been able to fight at all were it not for the federal dollars they were receiving. This is a national problem and can only be solved by a national mandate.

II. NATURAL DISASTERS IN FEDERAL HISTORY

If more intergovernmental coordination is the answer to the problems exposed by Hurricane Katrina, the founding generation as well as contemporary constitutional scholars might reply that effective coordination of all levels of government was not the point of the original constitutional plan. From the point of view of the eighteenth century, a “coordinated” response by all levels of government to a policy problem poses a great risk of tyranny.

What of natural disasters, events that are nearly by definition beyond the capacity of state and local governments? Here we encounter a reality that has been made more familiar by works such as John Barry’s *Rising Tide*, a popular history of the vast flooding unleashed by the Mississippi River in 1927.³⁹ That is, it took many decades and repeated disasters to convince national officials, including the President, that the federal government had a role to play in alleviating the effects of natural disasters. For much of American history, victims of natural disasters were

³⁹ See generally JOHN M. BARRY, *RISEING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA* (Simon & Schuster 1997).

pretty much on their own.⁴⁰ Barry notes that in the late nineteenth century, "President Grover Cleveland, a Democrat, had vetoed an emergency appropriation of \$10,000 for drought victims in Texas, declaring that the government had no 'warrant in the Constitution . . . to indulge a benevolent and charitable sentiment through the appropriation of public funds . . . [for] relief of individual suffering which is in no manner properly related to the public service.'"⁴¹ As a matter of policy at least, the federal government was not concerned with whether U.S. citizens starved or died from lack of food, water, or medical care after a natural disaster. It was certainly not concerned with providing financial assistance so that they could get back on their feet.⁴² That was a matter for private relief efforts and whatever local officials had on hand.

Part of the point of Barry's book is that the provision of federal assistance after the 1927 flood and the assumption of federal responsibility for flood control along the Mississippi River represented a great change in the American system of governance.⁴³ Barry might be exaggerating somewhat, but his book does provide evidence for something historians and legal scholars have long emphasized – that the twentieth century saw a major change in the constitutional order, one involving greater federal involvement in matters previously jealously guarded by state and local governments. The change is usually attributed to the Great Depression and the New Deal period, although Barry's work shows that change was in the air even in the 1920s.

Most of us have grown up in a world in which federal assistance in time of disaster is taken for granted. Consider the primary conclusion of the House Select Committee: "Our investigation revealed that Katrina was a national failure, an abdication of the most solemn obligation to provide for the common welfare."⁴⁴ This conclusion implies that the nation fell

⁴⁰ See *id.* at 369–72.

⁴¹ *Id.* at 369.

⁴² As the Times-Picayune recounts: "In the first half of the 20th century, the U.S. government had virtually no role in disaster relief. When a hurricane struck Miami in 1926, it caused more than \$40 billion in damage in today's dollars. The federal government did nothing." John McQuaid & Mark Schleifstein, *Washing Away: Part 4: Tempting Fate*, NEW ORLEANS TIMES-PICAYUNE, June 26, 2002, available at http://www.nola.com/hurricane/index.ssf?/washingaway/temptingfate_3.html.

⁴³ See BARRY, *supra* note 39, at 399–407.

⁴⁴ FAILURE OF INITIATIVE, *supra* note 19, at x.

short on a key constitutional commitment. But is this conclusion consistent with historic understandings of federalism? To put this in a more pointed way, when did the national government formally commit itself to having primary responsibility for the welfare of the people of the states? Of course, the Committee could not point to a constitutional amendment or a widely understood legal commitment originating from the Preamble to the Constitution.

The Committee report is quite revealing on this score. As noted above, the Committee argued that the federal government must respond “proactively”⁴⁵ to a disaster like Katrina. Yet when discussing the military’s role, the Committee made this general remark: “The Select Committee does not believe there is a simple answer to improving state and federal integration. Local control and state sovereignty are important principles rooted in the nation’s birth that cannot be discarded merely to achieve more efficient joint military operations on American soil.”⁴⁶ Thus, the Committee’s report points ultimately in two directions – both toward greater federal responsibility in time of national catastrophe and toward a continued essential role for state and local governments. How could it be otherwise? The Committee could not by itself surmount the conflicts inherent in American federalism.

Why was the Committee confused in this way? The answer lies in the process of constitutional change.⁴⁷ When it criticized the national response, the Committee invoked a value system that was a product of informal twentieth century constitutional change and was not implied by anything in the text of the Constitution. This kind of criticism would not have occurred to anyone in the eighteenth or nineteenth centuries. During the twentieth century and especially during the New Deal, the constitutional order changed in a somewhat helter-skelter unplanned fashion. Certainly no constitutional amendment was approved that might have provided firm legitimacy and guidance to the federal government’s new power. The formal structure of American federalism remained intact.

⁴⁵ *See id.* at 132.

⁴⁶ *Id.* at 223.

⁴⁷ *See generally* STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (Princeton University Press 1996).

And so it is still the case that when natural disasters strike, the divided power of the federal structure presents a coordination problem. The kind of coordination that had to occur to avoid the Katrina disaster requires long-term planning before the event. The American constitutional system makes taking intergovernmental action difficult and complex. The process of coordinating governments can take years. In many ways, the government was just at the beginning of that process at the time of Katrina,⁴⁸ although we are now four years distant from the terrorist attacks of September 11, 2001 that set the latest round of disaster coordination in motion.

Suppose, however, that we don't have the luxury of taking the time to satisfy every official with a veto. This is the key point of tension between what contemporary governance demands and what the Constitution permits. The kind of limited change that occurred in 1927 can take us only so far. What Hurricane Katrina showed was that even after decades of experience with natural disasters, the federal and state governments were still uncoordinated and unprepared. The reasons they were unprepared go to the heart of the constitutional order.

III. FEDERAL LESSONS

Unless we learn some lessons, Katrina will happen again. It may be a massive earthquake, an influenza pandemic, a terrorist attack, or even another hurricane, but the same ill-coordinated response will indeed happen again unless some attention is paid to the constitutional and institutional lessons of Katrina. We need to "stop federalism" before it kills again. That is, we need to stop our customary thinking about what federalism requires in order to prevent another horrific loss of life and property.

First, let's approach the difficult questions left by the legacy of decades of informal constitutional change not reflected in the text of the Constitution. These changes mean that there is no real sense in which we can act to preserve and extend eighteenth century federal values. Much of the formal institutional structure is there (but not all – see the Fourteenth and

⁴⁸ I am referring to the "Hurricane Pam" exercise, which occurred in 2004 and revealed some of the shortcomings that were so evident during Katrina. Yet, no action was taken. See LESSONS LEARNED, *supra* note 5, at 24–25.

Seventeenth Amendments), but its meaning has been altered by informal constitutional change, most of which occurred in the twentieth century. So if we sound the call, as the House Committee did, for remaining faithful to the values of eighteenth century federalism, we become unthinking believers in an ideology that does not relate to contemporary reality. Moreover, the formal structure that does carry over from the eighteenth century is misleading because it has been supplemented and subtly altered by continuous institutional change.

The federal system as it exists today is our system, not that of the founding generation. “We” – generations still alive – created it and we are continuing to change it. The best example during the Bush administration was the No Child Left Behind Act,⁴⁹ legislation that involved an unprecedented intrusion into a subject, education, that everyone used to agree should be left to the states – at least left to the states for most of American history.⁵⁰ In any event, if this system is ours, we are responsible for its successful operation and we can decide to change it for good and sufficient reasons.

There is nothing in the Constitution to prevent us from doing better the next time. We can stop traditional federalist ways of thinking in order to prevent disasters and aid disaster victims when the worst occurs. An obvious place to start, one that has occurred to both the White House and the House Select Committee, is with the assumption that the initiative should lie with state and local governments and that the federal government should wait until their help is requested. The federal government already had installations, resources and personnel in the New Orleans area prior to Katrina and could have moved far more aggressively on its own to render assistance. Only previous national policy, based not on the Constitution itself, but on a sense of constitutional protocol, stood in the way.

Unfortunately, more than protocol stands in the way of preventing future disasters. Whether the policy is flood control, communications, or (perhaps in a future disaster) a massive need

⁴⁹ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified primarily in scattered sections of 20 U.S.C.).

⁵⁰ For a discussion, see Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885 (2006).

for medical care, the separated layers of government make coordination inherently difficult and time-consuming. Here the federal government will have to be far more directive than it has been in order to avoid future Katrinas. It will have to condition federal aid in these areas on timetables, the use of specific technology, and review by independent experts such as the National Academy of Sciences.

The failure of the levees (really floodwalls) in New Orleans especially highlights the role of science in government. There is evidence that budget cuts undermined the competence of USACE while the floodwalls were being built.⁵¹ But it has been well understood for decades that USACE has been occupied with being responsive to members of Congress and has ignored independent scientific analyses in planning water projects.⁵² One point Katrina should have established beyond any doubt is that scientific judgment should not be subject to any further federalist check. The scientific community is unitary in the sense that there is one community nationwide, not different communities for different states. Once procedures are in place for determining the best scientific judgment, those judgments must be implemented, not diverted by politicians operating in the service of the grand American tradition of localism.

The decision to build a levee or floodwall is a policy or political matter. There is always competition for limited tax dollars and politicians (provided the background constitutional order is sound) are in the best position to make those decisions. But the decision where and how to build and maintain a levee is a scientific and engineering enterprise. To put it mildly, Louisiana politicians did not see levee matters in this light. They treated levees as an occasion for political patronage, not technical expertise. One of the main lessons of Hurricane Katrina is that the judgment of independent scientists and engineers must be respected, lest Humpty Dumpty fall again with awful consequences and an unfathomable sense of loss.

⁵¹ See Ralph Vartabedian & Stephen Braun, *Fatal Flaws: Why the Walls Tumbled in New Orleans*, L.A. TIMES, Jan. 17, 2006, at A1.

⁵² See Houck, *supra* note 29, at 12–17.